

Understanding the legal and scientific issues behind water supply challenges in the Skagit

The problem

In 2006 the Department of Ecology (Ecology) amended the 2001 Skagit Instream Flow Rule establishing water reservations in the Skagit Basin that were not subject to instream flow rights set by the 2001 rule. The reservations provided a water supply for new groundwater withdrawals for rural homes and businesses.

While flows for the 2001 rule and its 2006 amendment are measured in the main stem of the Skagit River, the primary benefit is for flows in the hundreds of small streams that feed into the Skagit River. They are primary spawning and rearing habitat for seven species of salmon and steelhead trout, three of which are considered “threatened” species under the Endangered Species Act.

On Oct. 3, 2013, the Washington state Supreme Court ruled in *Swinomish Indian Tribal Community v. Department of Ecology* that Ecology exceeded its authority in establishing the water reservations. The decision meant that all new consumptive uses of water, including domestic permit-exempt uses, are required to mitigate impacts to protect minimum instream flows.

In addition, the ruling has created legal uncertainty for the water use by 475 homes and 8 businesses that relied on the water reservations since adoption of the 2001 rule. Since the court decision, Ecology has been working under legislative provisos to find alternative water supplies for both the 475 homes and businesses and to provide mitigation water for future rural water users in the Skagit Basin.

With the agreement of the Swinomish Tribe, Ecology Director Maia Bellon has exercised enforcement discretion and has not curtailed the water use of those who had relied on the 2006 reservations for their water supplies.

Skagit County has estimated there are potentially 5,700 rural parcels with no current legal access to water.

The history and science

Ecology is required to set minimum instream flows as per RCW 90.22 Minimum Water Flows and Levels and RCW 90.54.020 (a) of the Water Resources Act of 1971. Instream flows are established by administrative rule for specific levels of stream flow for a given river or stream to protect fish habitat.

The creation of the Skagit Instream Flow Rule was not done in haste or behind closed doors. It was the result of an open, public process that began with research on the Cultus Mountain tributaries of the Skagit River in 1994.

Ecology and seven other entities signed a memorandum of agreement in December 1996 committing to the development of a comprehensive watershed management plan for the Skagit River Basin. Signing the agreement were the city of Anacortes, Skagit County PUD No. 1, Skagit County, the Washington Department of Fish and Wildlife and the Upper Skagit, Swinomish and Sauk-Suiattle Indian tribes.

Instream flow studies were done by Cascades Environmental Services, Inc., which later became Duke Engineering Services, Inc. (Duke)

There are a variety of different scientific methods used to determine instream flows, which all focus on fish habitat. In the United States, abundant high quality fish habitat is considered to be the best indicator of river health, so generally, other instream resources thrive when fish thrive. In Washington, an instream flow rule is typically based on the stream flows that protect and preserve the most fish habitat. The method that was chosen for the Skagit watershed is known as the Instream Flow Incremental Methodology (IFIM). See “A Condensed Summary of the Science behind the Skagit River Basin Water Management Rule and the 2006 Amendment” at <http://www.ecy.wa.gov/programs/wr/nwro/skagit-wtrsolut.html>

The final 1999 Duke technical report: “Lower Skagit Instream Flow Studies” summarizing several studies commissioned by Skagit PUD and the city of Anacortes as part of the 1996 MOA, formed the basis for the instream flow recommendations made to Ecology and adopted in the 2001 Skagit River Basin Water Management Rule.

Because of natural hydrologic variability, preferred stream flows are generally not met each year throughout the year. Since 2004, the instream flows set by the 2001 Skagit Water Management Rule have been met between 185 and 335 days a year. Although these flows are not met each year, instream flow research says that high flows that occur about once every ten years provide benefits that are important to sustaining fish populations.

Skagit water supply solutions

Ecology had been working on water supply issues in the Skagit Basin even before the October 2013 state Supreme Court ruling on the Skagit rule amendment. To offset the depletion of water reservations in Skagit subbasins, in April 2012 the Legislature approved \$2.25 million in funding to obtain water for mitigation purposes. The Legislature later reauthorized the funding in June 2013.

As 2014 draws to a close, the following options are being pursued to provide mitigation water for new groundwater withdrawals in the Skagit Basin. Ecology has:

- Acquired three water rights from the Big Lake Water Association, a public water system near Mount Vernon. These rights should provide enough water for as many as 70 homes, as well as water for stream flow enhancement. Ecology is working with Washington Water Trust to develop a water bank that will allow property owners in the Lower Skagit access to mitigation.
- Partnered with the Upper Skagit Indian Tribe to develop a water storage and stream flow enhancement project in the Fisher Creek subbasin of the Skagit River.
- Evaluated projects that could capture and store water during the wet season and then release the water during the dry summer months.
- Begun talks with public utilities for leasing water in the Skagit Basin on a temporary basis.

Public announcements of water availability from any of these options are still several months away.

More information

Go to <http://www.ecy.wa.gov/programs/wr/nwro/skagit-wtrsolut.html> for:

- “A Condensed Summary of the Science behind the Skagit River Basin Water Management Rule and the 2006 Amendment”
- “How did Ecology create the Skagit River Basin Water Management Rule and its Amendment?”
- “A summary of the 1999 Duke Final Report – the basis for the 2001 Skagit Instream Flow Rule”
- Skagit Basin water solutions

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